

CASE NO. SC86547

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.
DAVID WOMACK,
Relator,

v.

THE HONORABLE DENNIS A. ROLF,
Respondent.

BRIEF OF RESPONDENT

Respectfully submitted,

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ARGUMENT

STANDARD OF REVIEW

The writ of prohibition is an extraordinary remedy that should be used with great caution and only in cases of extreme necessity. *State ex rel.*

Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750, 752 (Mo. 1991). This Court has further noted that one court should not substitute its judgment or discretion for that of another court that is properly exercising its jurisdiction. *Id.*

THIS CASE IS MOOT BECAUSE THE CHILD IN QUESTION IS NOW EIGHTEEN AND NO LONGER A MINOR

The child that is at the center of this dispute was born on May 30, 1987 and, therefore, turned eighteen on May 30, 2005. (*See* Appendix to Relator's Brief, p. A-16). Because he is now eighteen, his consent alone is all that is needed for the adoption. R.S.Mo. 453.030.11. Therefore, Relator's argument is moot and a Writ of Prohibition should not be issued in this case.

RESPONSE TO RELATOR'S POINT RELIED ON

Relator's argument that Respondent lacked jurisdiction to proceed with the Chapter 453 adoption case is flawed for several reasons. First, as Relator points out, R.S.Mo. 211.093 states that Chapter 211 orders take precedence over any order entered under the authority of Chapter 453.

R.S.Mo. 211.093. This is not the same as saying that there is no jurisdiction to enter an order in a Chapter 453 case while a Chapter 211 case is pending as Relator argues. On the contrary, the statute sets out that a Chapter 211 order has priority over a Chapter 453 order, “**but only to the extent inconsistent therewith.**” R.S.Mo. 211.093 (emphasis added).

If Relator’s position is correct, then no child that is currently in foster care could be adopted since all children in foster care are there pursuant to an ongoing Chapter 211 case. This position also conflicts with the Missouri Legislature’s recognition of the entitlement of every child to a permanent and stable home as stated under both Chapter 211 and Chapter 453. *See* R.S.Mo. 211.443(3) and R.S.Mo. 453.005(1). This Court has noted that the process to terminate parental rights should be expedited in all ways possible in order to minimize the harm to children who “remain in limbo while the judicial system runs its course.” *D.G.N. v. S.M.*, 691 S.W.2d 909, 914 (Mo. banc. 1985). These stated goals are met in the situation that is present in this case because the termination of the child’s parental rights is executed at the same time as the adoption which provides the child a permanent and stable home without any gaps in custody.

As Relator pointed out, the pivotal Missouri Supreme Court case interpreting R.S.Mo. 211.093 is *In the Matter of J.F.K.*, 853 S.W.2d 932

(Mo. 1993). In that case, a Chapter 211 case was instituted in which legal and physical custody of the child was placed with the Division of Family Services (DFS) which in turn placed the child with foster parents. *Id.* at 933. The foster parents then initiated an adoption proceeding pursuant to Chapter 453. *Id.* Immediately after the foster parents initiated the adoption action, DFS removed the child from the foster parents' home and physical custody was awarded to the child's maternal grandparents. *Id.* Legal custody of the child remained with DFS. *Id.*

This Court noted that the adoptive parents could initiate an action for adoption and termination of parental rights independently of the Chapter 211 case as long as that action is consistent with the orders entered under Chapter 211 as set out in R.S.Mo. 211.093. *Id.* at 934-35. Based on the facts in *J.F.K.*, this Court held that granting custody of the child to the foster parents would be inconsistent with the orders in the Chapter 211 case in which custody was awarded to DFS and, therefore, the court had no jurisdiction to proceed on the foster parents' action for custody and adoption. *Id.* at 935.

Several key facts of the *J.F.K.* case can be distinguished from the facts in this case. First of all, in the case at bar, both the Chapter 211 case and the adoption petition are pending before the same Judge while there

were two different judges involved in the *J.F.K.* case. If the same judge is handling both cases, it is unlikely that the judge would enter inconsistent orders. Additionally, in the case at bar, the child was placed in the foster care of Mr. and Mrs. Bibens on September 25, 2003 and that placement remained the same after the adoption proceeding was initiated by Mr. and Mrs. Bibens while in *J.F.K.*, custody was changed. Further, in the Order of Court Following Permanency Hearing entered in the Chapter 211 case on August 23, 2004, the Court found that the child interacts well with Mr. and Mrs. Bibens and has adjusted well to foster placement. (*See* Appendix to Relator's Brief, p. A-23). In the same Order, the Court found that the child's mother has not followed through on responsibilities, the father is in prison and ordered permanency for the child through adoption. (*See* Appendix to Relator's Brief, pp. A-23, A-24). Therefore, unlike the *J.F.K.* case, continuing with the adoption proceeding in this case is not inconsistent with the Order in the Chapter 211 case because the placement of the child has remained with the foster parents and adoption is the permanency plan.

If Relator's position is correct, then no person, including a foster parent who has physical custody of a child in foster care, would be able to petition the court for adoption and termination of parental rights while a Chapter 211 case is pending. This position is contradictory to Missouri law.

In fact, there are several statutes under Chapter 453 that address situations in which a Chapter 211 case is pending simultaneously with an adoption case that is filed pursuant to Chapter 453. For example, R.S.Mo. 453.010.3 states that a petition to adopt a child who is under the continuing jurisdiction of a court pursuant to Chapter 211 must be brought in the juvenile division of the circuit court that has jurisdiction over the child. This provision was added by the legislature after the *J.F.K.* case was decided. R.S.Mo. 453.010. Additionally, R.S.Mo. 453.040(8) provides that consent to adopt a child is not needed from a parent whose parental rights may be terminated for any grounds set out in 211.447 and the petition for termination can be filed as a count in the adoption petition. Grounds under 211.447 include children who are under the Court's jurisdiction. Further, R.S.Mo. 453.070.7 provides that preference for the adoption of children in foster care shall be given to foster parents. All foster children are under a Court's Chapter 211 jurisdiction. Likewise, R.S.Mo. 453.073 allows for an adoption subsidy to be paid to children who have been in the care and custody of the Division of Family Services under the foster care program. Finally, R.S.Mo. 453.080.1(1) allows the six-month custody requirement to be waived if the child is under the continuing jurisdiction of the court pursuant to Chapter 211 and the person petitioning for adoption is the child's current foster parent.

As demonstrated by these statutes, Missouri law clearly contemplates the situation in this case where a petition for adoption is filed pursuant to Chapter 453 while a Chapter 211 case is pending. Even if the parental rights have been terminated, the court still has jurisdiction over the child pursuant to Chapter 211 in order to place custody of the child with the Missouri Children's Division. If every Chapter 211 case had to be dismissed prior to the filing of an adoption petition pursuant to Chapter 453, there would be a lapse in the care and custody of the child which is certainly not the intended result under Missouri law.

Relator argues that despite the plain language of R.S.Mo. 211.093, this Court in *J.F.K.* interpreted the statute to mean that a Chapter 453 case cannot even be filed while the Chapter 211 case is pending. This interpretation is much broader than the plain language of the statute and is contrary to R.S.Mo. 211.447(8) which allows termination of parental rights to be heard as part of a Chapter 453 adoption case. When interpreting statutes, this Court determines the intent of the legislature, giving the language used its plain and ordinary meaning. *See Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. 2005). Because of this, it is unlikely that this Court would interpret R.S.Mo. 211.093 to prohibit even the filing of a Chapter 453 case when a Chapter 211 case is pending since the plain and ordinary

language of 211.093 clearly allows both cases to co-exist with the provision that the Chapter 211 case takes precedence when there are any inconsistent orders. Requiring that a Chapter 211 Order take precedence assumes the entry of an Order in a non Chapter 211 case.

The Missouri Court of Appeals has noted that R.S.Mo. 211.093 clearly allows a Chapter 211 proceeding to exist at the same time as a Chapter 453 proceeding as long as any conflict is resolved in favor of the Chapter 211 orders. *Blackburn v. Mackey*, 131 S.W.3d 392, 395 (Mo. App. W.D. 2004). In *Blackburn*, the Court determined that the decision to grant custody to a child's mother in a Chapter 452 case is not fundamentally inconsistent with the Chapter 211 action in which the child was placed with the mother. 131 S.W.3d at 396. In that case, a Chapter 211 case was instituted after allegations of abuse by the child's father. *Id.* at 394. Custody of the child was placed with the child's mother and supervised by DFS and the father was not to have any contact with the child. *Id.* The mother then instituted a proceeding under Chapter 452 to modify previous dissolution orders in order to make them consistent with the juvenile court's orders. *Id.* The same Judge presided over both actions and on the same day, the Judge issued an order granting sole physical and legal custody to the

mother in the Chapter 452 case and issued an order dismissing the Chapter 211 case. *Id.* at 394-95.

The father in *Blackburn* argued that the Judge did not have jurisdiction to enter the Chapter 452 order which was inconsistent with the Chapter 211 order. *Id.* at 395. The Court stated that there is no problem with two different proceedings involving a child pending at the same time as contemplated by R.S.Mo. 211.093. *Id.* The Court also noted that it disagreed with the holding in *Ogle v. Blankenship*, 113 S.W.3d 290 (Mo. App. E.D. 2003), in which the Eastern District determined that a Chapter 452 action must be dismissed whenever a Chapter 211 action is pending, because that holding is not in accord with R.S.Mo. 211.093. *Id.* The Court reasoned that the release of a Chapter 211 case must be closely coordinated with an order issued in a Chapter 452 case so that there is no lapse in the protection of the child. *Id.* at 397. Further, the Court noted that unlike the situation in the *J.F.K.* case, granting custody to the mother was not inconsistent with the Chapter 211 order which also placed the child with the mother. *Id.* at 396. Therefore, the Court determined that the circuit court had jurisdiction of the Chapter 452 case even while the Chapter 211 case was pending because the two proceedings were not inconsistent. *Id.*

In an earlier case, the Missouri Court of Appeals noted there is no conflict when a foster parent brings a petition for adoption and termination of parental rights when such an action is brought with the original concurrence and encouragement of DFS. *In re M.O.*, 70 S.W.3d 579, 583 fn1 (Mo. App. W.D. 2002). In that case, the child was living with the foster parents when the foster parents filed the adoption action with the consent of the Juvenile Officer. *Id.* at 581. The Court stated that unlike the situation in *J.F.K.*, there was no conflict between the Chapter 211 and Chapter 453 actions. *Id.*

The case at bar is similar to the facts in *Blackburn* because the child is placed with the same people in the Chapter 211 case who are petitioning for adoption in the other case. While the Court in *Blackburn* suggested that it is proper to terminate the Chapter 211 case before transferring custody in another case, it also stressed that this must be done simultaneously so that there is no lapse in the care and custody of the child. Therefore, it would be improper for Judge Rolf to terminate the Chapter 211 case prior to exercising jurisdiction over the adoption proceeding because of the possibility that the Court could determine that grounds do not exist to warrant termination of parental rights and adoption. Additionally, as in *Blackburn*, there is no inconsistency between the orders in the Chapter 211

case and the adoption case because the person who is petitioning to adopt the child is the same person that the child was placed with in the Chapter 211 case. As such, Judge Rolf was acting within the court's proper jurisdiction in denying Relator's motion to dismiss the adoption petition and this Court should not issue a Writ of Prohibition.

One must fairly assume that in handling the adoption case, Judge Rolf will be mindful of the Orders he has entered previously in the Chapter 211 case. If in the adoption case Judge Rolf were to determine that grounds exist to terminate the parents' rights and further determine that termination of parental rights was in the child's best interests, he could consider granting an adoption and then entering such Orders as deemed necessary and appropriate in the Chapter 211 case.

In this case, there is no conflict to resolve because the adoption proceeding is consistent with all orders issued in the Chapter 211 proceeding. Mr. and Mrs. Bibens have had physical custody of the child since 2003 and that arrangement continued after their adoption petition was filed. In fact, the Petition for Adoption filed by the foster parents does not request an award of custody because the foster parents already had physical custody by virtue of being the foster parents. Also, rather than asking for legal custody, the Petition for Adoption requests a Decree of Adoption. This

is not a case in which the child was taken away from Mr. and Mrs. Bibens either before or after the adoption petition was filed. In fact, Mr. and Mrs. Bibens were selected by the Children's Division to proceed with the adoption.

There is nothing in Missouri statutes or case law to support Relator's argument that Judge Rolf lacked jurisdiction to proceed with the adoption case under Chapter 453. In fact, Missouri law specifically contemplates the situation such as in the case at bar where a Chapter 211 case and a Chapter 453 case are occurring simultaneously. As stated in R.S.Mo. 211.093, these two cases can proceed at the same time with the caveat that the orders issued in the Chapter 211 case take precedence, but only if these orders are inconsistent with the orders issued in the Chapter 453 case. Relator has incorrectly interpreted this provision to mean that a Chapter 453 case cannot be filed while a Chapter 211 case is still pending. To hold that a Chapter 453 case cannot proceed while a Chapter 211 case is pending would effectively stop all adoptions of children in foster care across Missouri. This would create a lapse in the children's care and deny them the opportunity for a permanent and stable home which is the intended goal under both Chapter 211 and Chapter 453.

CONCLUSION

As noted above, the child in question turned eighteen on May 30, 2005 and, therefore, is no longer a minor and there is no need to obtain consent for his adoption. Regardless, Judge Rolf acted within the court's jurisdiction when he denied Relator's motion to dismiss the adoption petition that was filed in this case pursuant to Chapter 453. This ruling is not inconsistent with the orders in the Chapter 211 case that is also pending before Judge Rolf since the child has remained with Mr. and Mrs. Bibens pursuant to the Chapter 211 case and custody of the child would remain with Mr. and Mrs. Bibens if their adoption petition is granted. Missouri law clearly allows the court to exercise jurisdiction in this situation. To hold otherwise would essentially stop all adoptions of children in foster care in Missouri which is contrary to the intended goal of the Missouri legislature.

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RULE 84.06(C) CERTIFICATION

I hereby certify that Respondent's Brief contains 3147 words and 419 lines of monospaced type. In determining this count, I relied on Microsoft Word which was used to prepare the brief.

James A. Waits

CERTIFICATE OF SERVICE

I hereby certify that one copy of the above and foregoing along with one floppy disk containing the same were mailed, first class, postage prepaid, this _____ day of June, 2005 to:

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APPENDIX

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